No. 2894.

In the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellant,

v.

GRAND CANYON CATTLE COMPANY, a corporation.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

This is a suit by the United States to cancel four patents issued under the mining laws to one B. F. Saunders for four mining claims and a mill site in the State of Arizona.

At the time these patents were issued, and for a number of years prior thereto, Saunders was engaged in the cattle business, maintaining several ranches (R. 35). One of these ranches was known as the Buckskin Mountain or V. T. Ranch (R. 38), and it is upon this ranch that the lands involved are located.

A plat of the ranch will be found in the record on page 567, and a diagram showing the Kaibab National

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Forest and the location of the lands with respect thereto will be found on page 522. One of the patented tracts, known as Jacobs Lode claim is within the limits of the forest, while the other claims adjoin the forest on the east. This diagram shows that the patented lands in question, and in addition thereto a number of unpatented mining claims, are all located upon, or immediately adjoining, springs, lakes or water holes.

The bill alleged that the evidence offered by Saunders which induced the officials of the Land Department to issue the patents in question was false in that the lands involved were not mineral lands either at the time of the filing of the applications to purchase or at any other time; that there had been no discovery of mineral upon any of the mining claims; that the mill site was not occupied and used for mining purposes for the storage of ore from the mining claims, as contemplated by the law; that Saunders had made no mining improvements whatever upon the lands but such work as had been performed thereon had been done for the purpose of developing the water supply and it was for that purpose alone that any improvement had been made (R. 39).

At the time that the bill was filed, 1912, the land had been sold to the Grand Canyon Cattle Company, which company, and one Ora Haley, who was in partnership with Saunders when the patents were procured, were made defendants. Saunders having died and Haley having parted with his interest to the company, the latter alone defended the suit. The answer disclaimed knowledge on the part of the de-

fendant as to whether or not the proof offered by Saunders in support of the mining claims was false but admitted that the patents were issued as specified in the bill; admitted the purchase from Saunders in 1907, but denied that the company had at the time of its contract of purchase any knowledge or information whatever of the illegal methods or proceedings by which the title to the lands had been acquired. The company claimed that it had purchased the lands for valuable consideration in good faith and that it took the title relying upon the patents that had been issued by the government (R. 459).

A great deal of evidence was offered by the government showing that the lands in question were not mineral lands; that no mineral had ever been discovered thereon; that the development work, so-called, was done solely for the purpose of developing the water holes and springs which the lands contained; that Saunders was in the cattle business and so was the purchaser, the Grand Canyon Cattle Company, and the sole and only use ever made of the lands, either the mining claims or the mill site, was for the purpose of watering cattle and maintaining corrals. Some evidence was also offered intended to show that the officers of the defendant company had knowledge of the illegality of the claims prior to their purchase from Saunders.

The defendant offered the testimony of one witness only—E. J. Marshall, the President of the company, who admitted that the land had been bought for the purpose of operating it as a cattle and stock ranch,

but denied that he or any officer of his company had knowledge of the fraud by which the titles were procured from the government.

In a memorandum opinion filed at the time of the entry of the decree dismissing the bill, the District Judge stated that he had no difficulty in finding that Saunders was guilty of at least legal fraud and that if it were an action solely between the government and Saunders, a decree would be entered in behalf of the former. Upon the other question presented, however, whether the Grand Canyon Cattle Company was a *bona fide* purchaser for value, the Judge said:

> I am of the opinion that there is an utter failure to establish such allegations, and I find that said Grand Canyon Cattle Company at no time prior to the date of the delivery of the deed and the payment of the consideration, which was *bona fide,* had any actual knowledge or notice of the alleged fraud or illegal methods of Saunders, or of facts sufficient to put it on inquiry, and that the defense of a *bona fide* purchaser for value without notice has been fully met and proved. (R. 465.)

The government's appeal brings the case before this court.

ASSIGNMENT OF ERROR.

The error upon which we rely is found in the 53d assignment, and may be substantially stated as follows:

The District Court erred in holding that the defendant company was a bona fide purchaser without notice.

ARGUMENT.

The defense of bona fide purchaser is an affirmative defense which must be set up and proved, and it has not been established in this case.

(*a*) *The defense of bona fide purchaser must be set up and proved.*

It has been so clearly settled by the Supreme Court that the defense of *bona fide* purchase is an affirmative defense which must be specifically set up and established, that any extended argument on this point is unnecessary.

A recent decision in which the rule is stated and reaffirmed is that of *Wright-Blodgett Company* v. *United States*, 236 U. S., 397, 403, where in speaking of this defense the court said:

> But this is an affirmative defense which the grantee must establish in order to defeat the Government's right to the cancellation of the conveyance which fraud alone is shown to have induced. The rule as to this defense is thus stated in *Boone* v. *Chiles*, 10 Pet. 177, 211, 212: "In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee, and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to, and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea

> show how the grantor acquired title. * * * The title purchased must be apparently perfect, good at law, a vested estate in fee-simple. * * * It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. * * * Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchase without notice; the case stated must be made out, evidence will not be permitted to be given of any other matter not set out."

(*b*) *The defense of bona fide purchase has not been established.*

Tested by the rule announced by the Supreme Court in the case cited, it will be readily seen how far short the defendant fell in this case.

The rule requires that "The consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed." In this connection the answer merely alleges that the company purchased the lands from Saunders—

> for a valuable consideration, in good faith, without any knowledge or notice whatever of any fraudulent, irregular or improper means by which the title to said premises had been obtained by said B. F. Saunders, if any such improper, irregular or fraudulent means for said purpose had been employed by said B. F. Saunders; that it took the title to said premises from said B. F. Saunders relying upon the record title thereto as exhibited and shown to it by the

> record of the patents from the plaintiff, the United States, to the said B. F. Saunders, and not otherwise. (R. 459.)

A statement as to what the consideration was is entirely wanting; nor is this defect in the answer in any manner supplied by the evidence, as we shall undertake to show.

However, assuming that the defense was sufficiently set up in the answer, all the evidence to support it must be found in the testimony of Mr. Marshall, the company's president, as he was the only witness offered by the defendant. We shall accordingly review his testimony.

He first visited the ranch in June, 1907, but prior to that time had had some negotiations with Saunders looking to a possible purchase of the property (R. 307). He inspected a number of places on the ranch for the purpose of examining the water supply (R. 308), and among those places was the Jacobs Lode, located at Jacobs Lake—one of the patented tracts (R. 309). He had a map of the place and discussed the titles with Mr. Clark, who was Saunders' agent and conducted witness over the premises (R. 309–310).

Mr. Marshall again visited the ranch in September, 1907, but as a result of his two trips there he—

> got no impression at all of these patented mining claims as to their mineral features. My examination of those lands was not with any reference to mineral. There was no statement made to me by anybody with respect to their mineral character or in respect to their development. (R. 313.)

The contract for the purchase was signed July 30, 1907, at which time Marshall paid Saunders $15,000 (R. 312). This contract will be found in the record beginning at page 433; it shows that the property to be transferred consisted of two ranches, appertaining to which there were lands, waters, easements, tenements and hereditaments, including six 40-acre tracts located with forest reserve scrip, 5 patented mineral claims constituting the claims in question, 4 unpatented mineral claims, 2 desert land claims containing 360 acres intended to be used as a reservoir site; also houses, corrals, fences, wagons, farming implements, harnesses, and more than 24 miles of pipe line used for carrying water; between twelve and fourteen thousand head of stock cattle, 175 saddle horses, pack mules and pack horses, and also shares of the stock of a corporation engaged in the business of buffalo raising, having a par value of at least $4,000.

The price agreed upon for the ranch was $50,000, with $16 a head for cattle, and $20 a head for the horses. According to the testimony of Mr. Marshall, the plant consisted of—

> all the land owned, scrip, lands, water appropriations, pipe-lines, troughs, corrals, buildings, wagons, supplies, harness, saddles, and everything that went to make up the equipment, and everything that in any way pertains to what is known as the V. T. ranch. That went in as the plant for the sum of fifty thousand dollars; that includes all cabins, structures or houses that were located on owned property, or whatever Saunders' rights were to property on the Forest

> Reserve. In other words, my understanding was that it included any property that Mr. Saunders claimed through either legal or equitable right or through possession. (R. 330–31.)

It will thus be seen that so far as the record shows the consideration actually paid for the patented lands may have been negligible, as those tracts contained but 71.55 acres and comprised only a small part of the area purchased. Indeed, Marshall admitted that he did not attach much importance to the unpatented claims or *ownership of anything* on the Forest Reserve; for the reason that unless his company had grazing permits from the Bureau of Forestry it would have no rights on the Forest Reserve, "whether we owned them or not" (R. 336–337).

The $15,000 that was paid to Saunders was repaid to witness by the defendant cattle company (R. 314). Prior to the execution of the deeds, which took place early in December, 1907, witness consulted an attorney furnishing the latter the abstract of the title (R. 315). This abstract is in the record at pages 445 to 447, and clearly shows that title to the tracts involved was acquired under the mining laws, the names of the locations being given in full. Moreover, Mr. Marshall admitted that he knew the company was buying five patented mining claims. He had full information in regard to them. Saunders told him that there was water on the patented mining claims and witness would not have bought them unless he knew that was so (R. 326).

Witness asked his attorney, to whom the question of title was referred, whether a patent from the United

States on a mining claim was to be regarded in the same way as a patent to a homestead or desert claim, or are all United States patents on the same plain. The attorney's answer to that question was "yes" (R. 331). But witness did not know that his attorney had made any visit to inspect the claims. Witness knew of no facts to lay before the attorney except that the lands had been pointed out as United States patented mining claims. He did not inform his attorney as to the improvements on them, which consisted solely of stock, corrals, houses, etc. (R. 331).

Saunders was not a miner but was a cattleman engaged in the business of raising cattle. That was clearly known to Mr. Marshall who desired the lands for the same purpose. He knew that the so-called mining claims contained water. He knew they had been used for the purpose of furnishing water for the stock and cattle upon the ranch and he wanted them for the same purpose himself. He also knew that such title as Saunders had had been obtained under the mining laws. That fact had been pointed out to him particularly. Moreover, it was clearly disclosed by the abstract of title that was furnished him and he would therefore have been charged with notice even though his attention had not been specifically invited to the matter. *Washington Securities Co.* v. *United States*, 234 U. S., 76.

The obligations resting upon the intending purchaser of real estate are clearly defined by the Supreme Court in the case of *Simmons Creek Coal Co.* v. *Doran*, 142 U. S., 417, 437, where the court quotes approvingly

the rule stated by the Virginia Court of Appeals in *Burwell's Adm'rs* v. *Fauber*, 21 Gratt., 446, 463:

> Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat emptor* is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a *bona fide* purchaser. He is bound not only by *actual*, but also by *constructive* notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice.

No elaborate argument is necessary to show that Mr. Marshall did not meet the obligation resting upon him in this case. He knew that some of the lands he was buying had been acquired as mining claims. He knew that they contained water holes; that they had been used for that purpose and, so far as he knew, for no other purpose. True, he asked his attorney whether a patent under a mining claim was to be regarded in the same light as a patent under any other public land law and was told that it was, but he admits that he did not tell his attorney the uses to which the lands had been put; neither did he say anything about the character of the improvements that had been made thereon. The record shows beyond question that no mineral was ever taken from any of the mining claims,

or, indeed, that any mineral was ever discovered therein. Mr. Marshall must therefore have been blind indeed not to see that the patents had been improperly obtained from the government.

Moreover, as already indicated, the defendant failed to show that it paid any consideration whatever for the lands involved in this suit. True, it paid $50,000 for the entire plant, of which these claims constituted but a very small part, and it is quite possible that the purchase would have been made for substantially the same price, whether the title to the water holes in question was considered good or not; in fact Mr. Marshall expressly stated that it made little or no difference whether the company owned or did not own anything on the Forest Reserve, and one of these claims is within the limits of the Forest.

The District Judge erroneously assumed that the burden was upon the government to show that the purchase was made with notice of the fraud by which the titles were acquired and thus entirely ignored the obligations resting upon an intending purchaser; otherwise he could never have reached the conclusion upon which his judgment was based.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court was erroneous and should be reversed.

S. W. WILLIAMS,
Special Assistant to the Attorney General.

AUGUST, 1917.

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